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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

NO. 644

BANKS & RUMBAUGH, *Petitioner*

VERSUS

MAURICE J. TOBIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and Brief in Support of Petition

JAMES O. MARBERRY, JR.
TOM SEALY
J. HENRY WILKINSON, JR.
Attorneys for Petitioner
Midland, Texas

Of Counsel:

STUBBEMAN, MCRAE & SEALY
Midland, Texas

E. DUNCAN & CO., Brief Printers, 1329 E. Jefferson, Dallas, Texas

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I. Summary Statement of the Matter Involved

Commencing about January 15, 1951, respondent's representative, Edward Russell Smith, wage-hour in-

vestigator of the United States Department of Labor, with the assistance of petitioner's personnel, made an investigation of the books and records of petitioner covering the period 1949 and 1950 up to January 15, 1951. (R. 20, 29, 32). Smith testified at the hearing that he obtained all information needed from the records (R. 36, 37), and that both he and the Wage and Hour Division of the Department of Labor had determined that petitioner was covered by the Fair Labor Standards Act. (R. 38). Subsequently, in the absence of petitioner's president, H. L. Banks, Smith attempted to have petitioner's office girl prepare and hand over to him checks for him to distribute among petitioner's employees, which she refused to do. (R. 20, 21). Later Smith informed H. L. Banks that he, Smith, thought that petitioner was covered by the Fair Labor Standards Act and that it owed certain employees for work they had done. (R. 20). H. L. Banks, on advice of his attorney, denied that petitioner was covered by the Act. (R. 20). H. L. Banks testified that about the end of March, 1951, Smith returned, asked if the man had been paid, and threatened to put petitioner out of business if they were not paid. (R. 20, 21).

Beginning about August 9, 1951, Smith again appeared and again demanded the books and records covering the period preceding January 15, 1951, which demand was

refused upon the ground that petitioner was not covered by the Fair Labor Standards Act. (R. 23, 35).

The subpoena duces tecum here involved was served upon petitioner by Smith on October 1, 1951, requiring petitioner, at a time and place stated, to produce all its time, payroll and work records covering the period from July 1, 1950 to September 26, 1951. (R. 10-11). Petitioner's representatives appeared at the time and place designated, but refused to produce the records demanded. (R. 4, 14, par. 10).

Respondent applied to the United States District Court for the Western District of Texas for an order to compel petitioner to comply with the subpoena and to produce the records. (R. 1-11). In its answer, petitioner denied that it or its employees were engaged in the production of goods for interstate commerce, and alleged that they were engaged in work of an essentially local nature and for that reason were not within the coverage of the Fair Labor Standards Act. (R. 14-15).

The District Court held that it had jurisdiction of the parties and of the subject matter; that it had jurisdiction to inquire into the question of whether petitioner or its employees were covered by the Fair Labor Standards Act; and upon the evidence adduced at the hearing held

that the petitioner and its employees were not within the scope of the coverage of that Act, and denied the application of respondent. (R. 46).

Respondent applied to the United States Court of Appeals for the Fifth Circuit. (R. 54). That court reversed the judgment of the District Court, and remanded with direction that an order be entered to secure enforcement of the subpoena. (R. 59, 60).

II. Jurisdictional Statement

The statutory provision believed to sustain the jurisdiction of this court is section 1254, subsection (1), of Title 28 of the United States Code, which provides that cases in the courts of appeals may be reviewed by this court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

The following case is believed to sustain the jurisdiction of this court: *Brooklyn Savings Bank v. O'Neill*, 324 U. S. 697 (1945).

The United States Court of Appeals for the Fifth Circuit, acting within its jurisdiction under Section 1291 of Title 28 of the United States Code, reversed the final order of District Court denying the application of respondent for enforcement of a subpoena duces tecum issued under alleged authority of the Fair Labor Standards Act, c. 676,

52 Stat. 1060 (1938), as amended, (29 U. S. C. 201 et seq., and supp. (1952)). (R. 59, 60).

The question involved (see III. below) is substantial for the reason that it bears upon the extent of the jurisdiction of the District Court in a hearing on an application for the enforcement of administrative subpoenas of every kind addressed to any person, under authority of any law, or similar process or demand, to inquire into the jurisdiction of the agency involved and in so doing to adjudicate the issue of coverage under the Act under which the agency is proceeding.

The statutes of the United States here involved are:

Section 6 of the Federal Administrative Procedure Act, c. 324, 60 Stat. 237 (1946), 5 U. S. C. A. Sec. 1005, which provides in part as follows:

"Sec. 1005. Ancillary Matters.

"Except as otherwise provided in this chapter—

* * *

"(c) Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extend that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue

an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to reply."

The date of the judgment sought to be reviewed by certiorari is January 14, 1953, and the date of this application for certiorari is March 2, 1953.

III. Questions Presented

The questions in this case are whether the District Court erred:

(1) In holding that it had jurisdiction to inquire into the question of coverage in a proceeding to enforce the demands of the administrative subpoena involved;

(2) In holding that the petitioner and its employees were not within the scope of the coverage of the Fair Labor Standards Act;

(3) In denying the application for enforcement of the subpoena.

IV. Reasons Relied on for the Allowance of the Writ

1. The decision of the United States Court of Appeals for the Fifth Circuit as to the proper construction of Section 6 (c) of the Federal Administrative Procedure Act, c. 324, 60 Stat. 237, 5 U. S. C. A. Sec. 1005 (c), in holding that this provision gives no authority to the courts to:

(1) determine whether the person and the subject matter to which an administrative subpoena is directed are within the jurisdiction of the agency seeking to enforce the subpoena; or

(2) to adjudicate the issue of coverage under the Act under the alleged authority of which the agency is proceeding in seeking enforcement of the subpoena;

involves an important question of Federal law which has not been but should be settled by this court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said court had in the case numbered and entitled on its docket, No. 14191, MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Appellant, versus BANKS & RUMBAUGH, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Fifth

Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Dated March 2, 1953.

Respectfully submitted,

JAMES O. MARBERRY, JR.
Midland, Texas

TOM SEALY
Midland, Texas

J. HENRY WILKINSON, JR.
Midland, Texas

Attorneys for Petitioner

Of Counsel:

STUBBEMAN, MCRAE & SEALY
Midland, Texas

James O. Marberry, Jr.

James O. Marberry, Jr.

Tom Sealy

Tom Sealy

J. Henry Wilkinson, Jr.

J. Henry Wilkinson, Jr.

Signatures of Counsel

Subject Index

		Page
I.	Opinions of Courts below	1
II.	Jurisdiction	2
III.	Statement of the case	2
IV.	Specification of errors	2
V.	Summary of the Argument	3
	Point A	3
	Point B	4
VI.	Argument	4
	Point A	4
	Point B	9

Table of Cases Cited

	Page
Baloc v. Foley Bros., 68 F. Supp. 533 (D. C. Minn., 1946)	12
Brooklyn Savings Bank v. O'Neill, 324 U. S. 697 (1945)	2
Brue v. Steers, Inc., 60 F. Supp. 668 (D. C. N. Y., 1945)	13
Clyde v. Broderick, et al., 52 F. Supp. 533 (D. C. Colo., 1943), rev'd on other grounds, 144 F. 2d 348 (C. A.-10, 1944)	13
Crabb v. Welden Bros., 164 F. 2d 797 (C. A.-8, 1947)	12
Endicott Johnson Corporation v. Perkins, 317 U. S. 501 (1943)	5, 6, 9
Kelly v. Ford, Bacon & Davis, Inc., 162 F. 2d 555 (C. A.-3, 1947)	12
Laudadio, et al. v. White Construction Co., 163 F. 2d 383 (C. A.-2, 1947)	12
McDaniel v. Brown & Root, 172 F. 2d 466 (C. A.-10, 1949)	12, 14
Murphy v. M. T. Reed, et al, 335 U.S. 865 (1948)	13
Nieves, et al. v. Standard Dredging Corporation, 152 F. 2d 719 (C. A.-1, 1945)	12

Table of Cases—Continued

	Page
Noonan, et al. v. Fruco Construction Company, 140 F. 2d 633 (C. A.-8, 1943)	12
Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186 (1946)	5, 6, 9
Parham, et al v. Austin Co., 158 F. 2d 566 (C. A.-5, 1946)	12
Scholl v. McWilliams Dredging Co., et al., 169 F. 2d 729 (C. A.-2, 1948)	12
Trefs v. Foley Bros., Inc., et al., 84 F. Supp. 159 (D. C. Mo., 1943)	13
Wells, et al., v. Ford, Bacon & Davis, Inc., 6 F. R. D. 606 (D. C. Ky. 1943), aff'd. per curiam, 145 F. 2d 240 (C. A.-6, 1944)	13

Table of Statutes Cited

	Page
Fair Labor Standards Act, c. 676, 52 Stat. 1060 (1938), as amended, (29 U.S. C. 201 et seq. and supp. (1952)).	2
Title 28, United States Code:	
Sec. 1254 (1)	2
Sec. 1291	2
Sec. 6 (c), Federal Administrative Procedure Act, c. 324, 60 Stat. 240 (1946), (5 U. S. C. 1005 (c))	5

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VERSUS

MAURICE J. TOBIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

Brief in Support of Petition for Writ of Certiorari.

I. Opinions of Courts Below

The opinion in the United States Court of Appeals for the Fifth Circuit, not yet reported, is dated January 14, 1953 (R. 52-59).

The decree of the District Court for the Western District of Texas, unreported, is dated April 14, 1952. (R. 46-47).

II. Jurisdiction

1. The date of the judgment to be reviewed is January 14, 1953. (R. 52).

2. The statutory provision which is believed to sustain the jurisdiction of this court is section 1254, subsection (1), of Title 28 of the United States Code.

3. The United States Court of Appeals for the Fifth Circuit, acting within its jurisdiction under Section 1291 of Title 28 of the United States Code, reversed the final order of the District Court denying the application of respondent for enforcement of a subpoena duces tecum issued under alleged authority of the Fair Labor Standards Act, c. 676, 52 Stat. 1060 (1938), as amended, (29 U. S. C. 201 et seq., and supp. (1952)). (R. 59, 60).

4. The following case is believed to sustain the jurisdiction of this court: *Brooklyn Savings Bank v. O'Neill*, 324 U. S. 697 (1945).

III. Statement of the Case

This has already been stated in the preceeding petition for review by certiorari under I (pp. 1-4) of said petition, which is hereby adopted and made a part of this brief.

IV. Specification of Errors

1. The United States Court of Appeals for the Fifth Circuit erred in holding that the District Court had no

authority to inquire into the question of coverage of petitioner and its employees under the Fair Labor Standards Act in a hearing on an application for enforcement of an administrative subpoena issued under that Act. (R. 54, 59).

2. The United States Court of Appeals for the Fifth Circuit erred in reversing the judgment of the District Court. (R. 59).

V. Summary of the Argument

Point A

The District Court had jurisdiction in this cause to inquire into the legal and factual situation to determine whether the petitioner (respondent in the District Court) and subject matter to which the subpoena was directed were within the jurisdiction of the agency which issued the subpoena, for the following reasons:

(1) Section 6 (c) of the Federal Administrative Procedure Act, c. 324, 60 Stat. 240 (1946), (5 U. S. C. 1005 (c)), specifically vests such authority in the Court; and

(2) In the instant case the agency by its testimony adduced at the hearing acknowledged that it had already determined that petitioner (respondent there) was covered by the Fair Labor Standards Act and had directed him to comply with its orders,

so that the additional investigation sought to be effectuated by the subpoena would be repetitious, arbitrary, capricious and unreasonable.

Point B

Having exercised its jurisdiction in this case the District Court correctly found that neither petitioner (respondent there) nor its employees were within the scope of the coverage of the Fair Labor Standards Act, for the reason that they were engaged in work of an essentially local nature not subject to the provisions of the Act, being new and original construction of a local nature.

VI.

ARGUMENT

Point A

The District Court had jurisdiction in this cause to inquire into the legal and factual situation to determine whether the petitioner (respondent in the District Court) and subject matter to which the subpoena was directed were within the jurisdiction of the agency which issued the subpoena, for the following reasons:

(1) Section 6 (c) of the Federal Administrative Procedure Act, c. 324, 60 Stat. 240 (1946), (5 U. S. C. 1005 (c)), specifically vests such authority in the Court; and

(2) In the instant case the agency by its testimony adduced at the hearing acknowledged that it had already determined that petitioner (respondent there) was covered by the Fair Labor Standards Act and had directed him to comply with its orders, so that the additional investigation sought to be effectuated by the subpoena would be repetitious, arbitrary, capricious and unreasonable.

Sec. 6 (c) of the Federal Administrative Procedure Act, c. 324, 60 Stat. 240 (1946), (5 U. S. C. 1005 (c)), provides in part as follows:

> "Sec. 1005. Ancillary matters.
>
> "Except as otherwise provided in this chapter— * * * (c) Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. *Upon contest the court shall sustain any such subpena or similar process or demand to the extent that is found to be in accordance with law* * * *" (Italics supplied.)

The effect of the decision rendered by the Court of Appeals for the Fifth Circuit is to hold that the enactment of the Federal Administrative Procedure Act and more particularly Section 6 (c) thereof did not abrogate the decisions of this court in *Endicott Johnson Corporation v. Perkins*, 217 U. S. 501, and *Oklahoma Press Publishing Co. v. Walling* 327 U. S. 186, which held that, on an application by an administrative agency to the District

Court for enforcement of a subpoena duces tecum, the Court was not authorized to decide the question of coverage in the enforcement proceeding.

It is the position of petitioner that the words: "in accordance with law" as used in Sec. 6 (c) of the Federal Administrative Procedure Act as set out hereinabove in this argument means substantially the same thing as the words: "including the authority or jurisdiction of the agency" and that as reflected by the remarks of Congressman Walter, a member of the House Committee on the Judiciary, as well as by the report of the House Committee on the Judiciary and comments of the Senate Judiciary Committee, all as hereinafter set out, Congress plainly intended by enacting the Federal Administrative Procedure Act to limit and in fact to expunge the harsh ruling enunciated in the *Endicott Johnson* and the *Oklahoma Press* cases, both *supra*.

This position is conclusively established by the following quotation of comments of the Senate Judiciary Committee on the revised text of Sec. 6 (c) of the Federal Administrative Procedure Act as set forth in Senate Document No. 248, 79th Cong., 2d Sess. (1946), at Par. (3), Page 28:

> "(3) *Private parties urge that after the word 'be' in the second sentence there be added, 'within the jurisdiction of the agency and otherwise', so that no administrative subpena may be enforced beyond the lawful jurisdiction of the agency. It is felt that*

'in accordance with law' as now stated [in the revised text set forth above] *means that.* * * *"

Said Sec. 6 (c) later became Sec. 6 (c) of the Federal Administrative Procedure Act without significant change.

The pertinent remarks made by Congressman Walter on this subject were as follows:

"Subsection (c) of Section 6 provides that, where Congress has authorized agencies to issue subpeonas, private parties may secure them upon an equality with Government representatives and without any more than a general showing of relevance and reasonable scope of the information sought. *Where administrative subpeonas are contested, the court is to inquire into the situation and issue an order of enforcement only so far as the subpena is found to be in accordance with law. This is a definite statutory right and is applicable to subpeonas of every kind addressed to any person under authority of any law. The effect of the subsection is thus to do more than merely restate the existing constitutional safeguards which in some cases, such as those involving public contractors—see Endicott Johnson Corp. v. Perkins* (317, U. S. 501, 507, 509, 510 (1943)), *have been held inapplicable. Also, the term 'in accordance with law' does not mean that a subpena is valid merely because issued with due formality. It means that the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpena is directed are within the jurisdiction of the agency which has issued the subpena.*" Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) 293, 344, 349, at 363. (Italics supplied.)

The report of the House Committee on the Judiciary, House Report No. 1980, 79th Congress, 2d Sess., (1946), dealing with H. R. 5988, which subsequently became the Federal Administrative Procedure Act, further supports this view, as shown by the following quotation:

> "* * * *The section constitutes a statutory limitation upon the issuance or enforcement of subpenas in excess of agency authority or jurisdiction, in connection with any agency function or authority.* * * * *courts* * * * *should* * * * *inquire generally into the legal and factual situation and be satisfied that the agency could lawfully have jurisdiction. The section expressly recognizes the right of parties subject to administrative subpenas to contest their validity in the courts prior to subjection to any form of penalty for noncompliance. In such contests, the court is required to determine all relevant questions of law.*" Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) 233, 265. (Italics supplied.)

Clearly the Congressional intent is best expressed by the members of the Congress themselves, and not by the Attorney General, the National Labor Relations Board, or other administrative agencies, and ought to be controlling in determining the Congressional intent.

The above quotations show the legislative intent of Congress in plain and unambiguous language and we ask that the court construe the Federal Administrative Procedure Act accordingly.

However, if this court should be of the opinion that the Federal Administrative Procedure Act, contrary to the

intention of Congress as expressed by Congressman Walter and the Judiciary Committees of both the House and the Senate, did not abrogate the holdings in the *Endicott Johnson* and *Oklahoma Press* cases, both *supra*, then petitioner submits that Judge Thomason, the trial Court, was nevertheless correct in going into the applicability of the Fair Labor Standards Act to this petitioner and into the jurisdiction of the agency on the subpoena hearing involved herein for the reason that, as admitted by the agents for the respondent seeking the subpoena, they (the agents and respondent) had already determined in their previous investigation that petitioner was covered by the Act, (R. 38, 39), and had directed that petitioner comply with their orders (R. 20, 21), so that under those facts and circumstances the trial court was clearly justified in concluding that this determination by the agency put the question of coverage squarely in issue, and that any further investigation would be repetitious, arbitrary, capricious and unreasonable, so as to justify the Court in inquiring into the jurisdiction of the agency and the coverage of petitioner and its employees under the Fair Labor Standards Act and in finding that petitioner and its employees were not in fact covered by that Act and in denying the application for an order compelling compliance with the subpoena.

Point B

Having exercised its jurisdiction in this case the District Court correctly found that neither petitioner (respondent

there) nor its employees were within the scope of the coverage of the Fair Labor Standards Act, for the reason that they were engaged in work of an essentially local nature not subject to the provisions of the Act, being new and original construction of a local nature.

The sole ground set forth in the complaint to show that this petitioner is subject to the Act is set out at Paragraph 5 of said complaint in the following language:

> "5. On information and belief at all times hereinafter referred to, the company [petitioner] has engaged at its place of business in Odessa, Texas, and elsewhere, in the production of goods for interstate commerce, as that term is defined by the Act, in that it has been engaged in *oil field construction work* for concerns engaged in the drilling for and production of crude petroleum, substantial quantities of which are thereafter shipped in interstate commerce in its crude form or as a refined product thereof." (R. 2-3). (Italics supplied.)

The term "oil field construction work" means and connotes the new and original construction of such permanent facilities as buildings, slush pits, sewer lines, septic tanks, water lines and gas lines in new oil field camps, water systems, fire walls around new storage tanks as a part of the original construction of such tanks before they are put into use, laying new field gathering lines, and laying foundations for new oil field storage tanks, but does not include reconstruction, repairs, servicing, or maintenance of such facilities after they are dedicated to use,

nor does said term include the construction of drilling rigs. "Oil field construction work" is essentially local in nature and does not comprise the production of goods for commerce. Employees engaged in oil field construction work are engaged in such activities as those described. (Affidavit, R. 15 at 16-17).

Testimony at the hearing indicates that petitioner and its employees are and have been engaged in oil field construction work (R. 19), in that they make new, original and permanent installations as follows: tank batteries, which consist of one or more tanks connected up with a heater and other equipment for the production of oil after the tanks are built, including dirt work necessary to the construction thereof and of fire walls around the tanks (said tank batteries to be ultimately tied into gathering systems); gathering lines and lease lines for gathering oil from the wells to the tanks; lease roads to wells; buildings, including two new and original warehouses under construction for Syd Richardson Carbon Company at the time of the hearing, and small buildings for tool houses; installation of service lines such as water, gas and sewer lines, and septic tanks for municipalities and in lease camps for Magnolia, Ted Weiner Oil Company, and H. L. Hunt. Said facilities have not previously been used in carrying any product in interstate commerce before the construction is complete. (R. 19, 21, 23-27, 28).

The record shows that such work has been done by petitioner within the year before the hearing in Ector,

Ward, Midland, Glasscock and Upton Counties, all within the State of Texas, thus establishing the fact that petitioner was engaged in local construction. All of such work is new and original construction of permanent installations and is completed prior to the dedication thereof to use for the production of oil. (R. 19, 24, 25, 28).

Some of such facilities, when completed and dedicated to use, may become instrumentalities of commerce in that they may be used in commerce or in the production of goods for commerce. But the local new and original construction of facilities which may or will, after completion, be used in commerce or in the production of goods for commerce, is not commerce or the production of goods for commerce. Until such construction is completed there is neither commerce nor production of goods for commerce.

Such activities as those here involved have been repeatedly held not to be within the scope of the Coverage of the Fair Labor Standards Act. *Crabb v. Welden Bros.*, 164 F. 2d 797 (C. A. -8, 1947); *Kelly v. Ford, Bacon & Davis, Inc.*, 162 F. 2d 555 (C. A.-3, 1947); *Laudadio et al v. White Construction Co.*, 163 F. 2d 383 (C. A.-2, 1947); *McDaniel v. Brown & Root*, 172 F. 2d 466 (C. A.-10, 1949); *Nieves et al v. Standard Dredging Corporation*, 152 F. 2d 719 (C. A.-1, 1945); *Noonan et al v. Fruco Construction Company*, 140 F. 2d 633 (C. A.-8, 1943); *Parham et al v. Austin Co.*, 158 F. 2d 566 (C. A.-5, 1946); *Scholl v. McWilliams Dredging Co., et al*, 169 F. 2d 729 (C. A.-2, 1948); *Baloc v. Foley Bros.*, 68 F. Supp. 533 (D. C. Minn.,

1946); *Brue v. Steers, Inc.*, 60 F. Supp. 668 (D. C. N. Y., 1945); *Clyde v. Broderick, et al*, 52 F. Supp. 533 (D. C. Colo., 1943), rev'd on other grounds, 144 F. 2d 348 (C. A.-10, 1944); *Trefs v. Foley Bros, Inc., et al*, 84 F. Supp. 159 D. C. Mo., 1943); *Wells v. Ford, Bacon & Davis, Inc.*, 6 F. R. D. 606 (D. C. Ky., 1943), aff'd. per curiam, 145 F. 2d 240 (C. A.-6, 1944).

The view that employees engaged in the original construction of buildings or facilities are not within the coverage of the Fair Labor Standards Act, even if the building or facility, when completed, will be used to produce goods for commerce, is supported, we think, by the action of this court in *Murphy v. M. T. Reed, et al*, 335 U. S. 865. In that case the Court of Appeals for the Fifth Circuit, 168 F. 2d 257, had held that employees of a contractor under a cost-plus-a-fixed-fee contract for the original construction of a Navy camp for training construction battalions (Sea Bees) and a Naval Advance Depot at Gulfport, Mississippi, were not within the coverage of the Fair Labor Standards Act of 1938, and that certain other employees, performing work under a cost-plus-a-fixed-fee contract for the maintenance and operation of such facilities, were likewise not within the coverage of such Act, and reversed a decision of the District Court holding that both groups of employees were within the coverage of such Act. This Court granted certiorari and directed that the judgments below be vacated and the case remanded to the District Court with instructions to dismiss those causes of action involving solely construc-

tion work and to reconsider the remaining cause of action. *McDaniel v. Brown & Root*, 172 F. 2d 466, (C. A.-10, 1949), at 471 n. 4.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the United States Court of Appeals for the Fifth Circuit herein.

Dated March 2, 1953.

JAMES O. MARBERRY, JR.
TOM SEALY
J. HENRY WILKINSON, JR.
Midland, Texas
Attorneys for Petitioner

Of Counsel:

STUBBEMAN, MCRAE & SEALY
Midland, Texas

James O. Marberry, Jr.
James O. Marberry, Jr.

Tom Sealy
Tom Sealy

J. Henry Wilkinson, Jr.
J. Henry Wilkinson, Jr.
Signatures of Counsel

Affidavit of Service by Mail

J. Henry Wilkinson, Jr., being duly sworn, says that he deposited a copy of the foregoing and annexed petition for writ of certiorari and brief of petitioner in the United States post office in the city of Dallas, Texas, enclosed in an envelope duly addressed to attorney for respondent at his business address, as follows:

SOLICITOR GENERAL

Washington, D. C.,

with postage fully prepaid, on the 3 day of March, 1953.

J. Henry Wilkinson, Jr.

Sworn to before me this 3 day of March, 1953.

Jno. W. Parker, Clerk
U. S. Dist. Courts
Nor. Dist. of Texas
By Romelle Hamilton
Deputy Clerk

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:

D. G. Bland Lumber Co. v. *National Labor Relations Board*, 177 F.2d 555	7
Detweiler Bros. v. *Walling*, 157 F.2d 841, certiorari denied, 330 U.S. 819	5
Endicott Johnson Corp. v. *Perkins*, 317 U. S. 501	4, 5
Graylyn Bainbridge Corporation v. *Woods*, 173 F.2d 790, certiorari denied, 337 U.S. 958	5
Holloway Gravel Co. v. *McComb*, 174 F.2d 421, certiorari denied, 338 U.S. 823	5
McComb v. *Hunsaker Trucking Contractor*, 171 F.2d 523	5
Mines and Metals Corp. v. *Securities and Exchange Commission*, 200 F.2d 317, rehearing denied, 200 F.2d 317, certiorari pending No. 645, this Term	5
Oklahoma Press Pub. Co. v. *Walling*, 327 U.S. 186	4, 5
United States v. *Morton Salt Co.*, 338 U.S. 632	10

Statutes:

Administrative Procedure Act, c. 324, Sec. 6(c), 60 Stat. 237, 5 U.S.C. 1005(a)	6, 13
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U.S.C. 201 *et seq.*:	
Sec. 9	9
Sec. 11(a)	11
Federal Trade Commission Act, c. 311, Sec. 9, 38 Stat. 717, 15 U.S.C. 49	12

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act, 1947, pp. 68-69	9
92 Cong. Rec. A2987	9
S. Doc. 248, 79th Cong. 2d Sess.	6, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 644

BANKS & RUMBAUGH, PETITIONER

v.

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 44-45) is not officially reported. The opinion of the United States Court of Appeals (R. 51-57) is reported at 201 F. 2d 223.

JURISDICTION

The judgment of the court below was entered on January 14, 1953 (R. 57). The petition for certiorari was filed on March 5, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether judicial enforcement of a subpoena *duces tecum* issued by the Administrator of the Wage and Hour Division, pursuant to Section 11(a) of the Fair Labor Standards Act, is dependent upon a prior judicial determination that petitioner is within the coverage of that Act.

STATUTES INVOLVED

The statutory provisions are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 *et seq.*,[1] Section 9 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 15 U. S. C. 49, and Section 6 (c) of the Administrative Procedure Act (c. 324, 60 Stat. 237, 5 U. S. C. 1005 (c)). These provisions are set forth in the Appendix, *infra*, pp. 11-13.

STATEMENT

The subpoena *duces tecum* here involved was issued by the Administrator of the Wage and Hour Division on September 26, 1951 (R. 11). Under its terms, petitioner was required to produce its records relating to its wage and hour practices and to its business for oil companies for the period from July 1, 1950, to that date, at a designated place in Odessa, Texas on October 9, 1951 (R. 9-10).

Representatives of petitioners appeared on the date and at the place designated in the subpoena,

[1] The cited sections of the Fair Labor Standards Act of 1938 are not affected in any way by the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. Supp. V, 201).

but only to state again that the records sought thereby would not be produced or made available to the Division (R. 4, 14; Para. 10). Following this refusal, respondent applied to the district court for an enforcement order. His application alleged, on information and belief, that petitioner is "engaged * * * in the production of goods for interstate commerce, as that term is defined by the Act" in that it is "engaged in oil field construction work for concerns engaged in the drilling for and production of crude petroleum, substantial quantities of which are thereafter shipped in interstate commerce in its crude form or as a refined product" (R. 2-3). It also alleged that all the books, papers and documents referred to in the subpoena "were at the time of the issuance of said subpoena duces tecum, and are now, relevant, material, and appropriate to determine whether the company has violated * * * the Act, and will aid in the enforcement of the provisions of the Act" (R. 4).

Petitioner's answer, filed in response to the application for an enforcement order, asserted that its oil field construction work was "of an essentially local nature" and, therefore, not subject to the Act (R. 14-15). The answer also asserted that respondent was "embarked on a mere fishing expedition, unwarranted in fact or in law" (R. 15). As the Court of Appeals noted, the answer contained "no allegations that the subpoena made unreasonable demands or that compliance therewith would be unreasonably burdensome, or would result in undue hardship" (R. 52). Nor was there

any allegation that the time and place named for the production was inappropriate or inconvenient. "Thus, the only issue joined by the pleadings was whether or not the corporation and its employees were subject to the provisions of the Act * * *" (R. 52). The trial court held that it had jurisdiction to decide this issue and concluded, upon the basis of the evidence adduced at the hearing, that petitioner and its employees were not subject to the Act. The relief sought by respondent was denied by the trial court solely on this ground.

The Fifth Circuit reversed, ruling that under this Court's decisions in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, and *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, the "District Court was not authorized to decide the question of coverage" in a subpoena enforcement action since "'Congress has authorized the Administrator * * * rather than the district court in the first instance, to determine [it] * * * in the preliminary investigation of possibly existing violations'" (R. 53). Petitioner's contention that the law as expounded in those decisions had been changed by the Administrative Procedure Act was rejected (R. 54-56), as was its contention that the question of coverage had become one for the courts by reason of an earlier inspection (R. 56). In the latter connection, the Court of Appeals made the observation that the "duty of the Administrator to investigate violations of the Act is a continuing one" (R. 56).[2]

[2] The record shows that when the earlier inspection was made petitioner did not dispute coverage and agreed to comply

ARGUMENT

The decision below is plainly a correct application of this Court's decisions in *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, and *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, and it presents no conflict with the decision of any other circuit court of appeals. The decisions of the courts of appeals subsequent to this Court's decisions in the *Oklahoma Press* and *Endicott Johnson* cases, *supra,* have uniformly approved judicial enforcement of subpoenas substantially identical to that here involved. *Detweiler Bros.* v. *Walling,* 157 F. 2d 841 (C. A. 9), certiorari denied, 330 U. S. 819; *Holloway Gravel Co.* v. *McComb,* 174 F. 2d 421 (C.A. 5), certiorari denied, 338 U. S. 823; *McComb* v. *Hunsaker Trucking Contractor,* 171 F. 2d 523 (C.A. 5). See also *Graylyn Bainbridge Corporation* v. *Woods,* 173 F. 2d 790 (C.A. 8), certiorari denied, 337 U. S. 958, and *Mines and Metals Corp.* v. *Securities and Exchange Commission,* 200 F. 2d 317 (C.A. 9), rehearing denied, *id.,* now pending on petition for certiorari, No. 645, this Term.

The court below correctly held that there is no merit in petitioner's contention that the law as

with the Act (R. 31), so that further enforcement action then seemed neither necessary nor warranted. Therefore, the inspector made only a limited routine investigation without attempting to gather the specific evidence that is needed in an enforcement action where coverage is contested. It was not until April 2, 1951, that petitioner raised any question concerning the application of the Act to its employees. On that date, its president advised the inspector that he had "changed his mind about complying with the law" and that he was going to follow his same pay practices "until forced to do otherwise" (R. 34).

established in the above decisions has been changed by Section 6 (c) of the Administrative Procedure Act. In pertinent part, Section 6 (c) of the Administrative Procedure Act merely provides that in the event of contest the court shall sustain an agency subpoena "to the extent that it is found to be in accordance with law." Nothing in this language suggests that the duty and burden of determining the question of coverage in the first instance was intended to be shifted from the administrative agency to the courts. Recognizing this, petitioner would amend the section by adding to the phrase "in accordance with law" the words "including the authority or jurisdiction of the agency" (Br. p. 6). But Congress itself deliberately and advisedly omitted these words from the section when the legislation was being considered.

The bill that became the Administrative Procedure Act, when originally introduced, read as follows with respect to agency subpoenas:

> * * * Upon any contest of the validity of a subpena or similar process or demand, the court shall determine all relevant questions of law raised by the parties, *including the authority or jurisdiction of the agency,* and in any proceeding for enforcement shall enforce (by the issuance of an order requiring the production of the evidence or data under penalty of punishment for contempt in a case of contumacious failure to do so) or refuse to enforce such subpena accordingly. [Emphasis supplied, S. Doc. No. 248, 79th Cong., 2d Sess., p. 158].

However, as the Court of Appeals noted in another opinion on the precise question raised by petitioner, "the Attorney General and the National Labor Relations Board protested to the appropriate congressional committees that it was necessary in practice for the subpoenas to be enforced before the Board's jurisdiction could be established." *D. G. Bland Lumber Co.* v. *National Labor Relations Board,* 177 F. 2d 555, 558 (C. A. 5). Accordingly, Section 6 (c) of the Act, as enacted, was changed so as to delete the language "that would have made the jurisdiction of the agency a litigable issue in subpoena enforcement proceedings" (177 F. 2d at 558) and to require only that the subpoena be "found to be in accordance with law." The significance of this change clearly shows that "Congress intended to leave the scope of judicial inquiry unchanged upon an application for the enforcement of a subpoena" (*id.* at 558).

Though the Committee Print and Congressman Walter's statement cited in petitioner's brief (pp. 6-7) indicate otherwise, everything else in the legislative history of the Administrative Procedure Act confirms the conclusion that Section 6 (c) as enacted was not intended to change the law as expounded in the *Oklahoma Press* and *Endicott Johnson* decisions. Thus, the Committee Report which accompanied the changed Senate Bill explained that Section 6 (c)

> * * * constitutes a statutory limitation upon the issuance or enforcement of subpenas in

> excess of agency authority or jurisdiction. *This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should, instead, inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction.* * * * [Emphasis supplied, S. Doc. No. 248, 79th Cong., 2d Sess., 185 at 206.]

The House Committee Report contains substantially the same explanation. See S. Doc. No. 248, 79th Cong., 2d Sess., 233 at 265.

The Department of Justice memorandum, included in the Congressional Record by Congressman Hobbs and made a part of Senate Document No. 248, 79th Cong., 2d Session, interpreted Section 6 (c) as follows:

> Under section 6 (c) it is provided that "upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found in accordance with law." This provision is not intended to change the law as expounded in *Endicott Johnson* v. *Perkins* (317 U. S. 501, 1943), in which the Supreme Court held that subpenas issued by an agency will be accorded due respect by the Court if they are within the agency's power and that there would be no independent inquiry as to whether the particular person subpenaed comes within the coverage of the act enforced by the agency. The law as expounded in *Endicott Johnson* v. *Per-*

> *kins* is still applicable. All that this section requires is that the court determine whether the subpena issued comes within the general power of that agency. There need be no in limine inquiries as to whether the person subpenaed is or is not covered by the act. [S. Doc. No. 248, at 415; Attorney General's Additional Statement, 92 Cong. Rec. A2987, May 25, 1946. See also Attorney General's Manual on the Administrative Procedure Act, 1947, pages 68-69.]

Even without regard to the clear wording of Section 6 (c) and its legislative history as set out above, it would seem that the Court of Appeals was fully justified in refusing to read into the section language which Congress itself deliberately omitted.

Petitioner urges that if this Court's *Endicott Johnson* and *Oklahoma Press* decisions have not been abrogated by the Administrative Procedure Act, the trial court was nevertheless authorized to inquire into the question of the applicability of the Fair Labor Standards Act to its employees because the Wage and Hour Division had already examined its records and determined the question for itself. This contention completely ignores the fact that the duty of the Administrator to make investigations under the Fair Labor Standards Act, like the duty of the Federal Trade Commission to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce, is a "continuing duty" and "is not suspended or exhausted" even

by a prior judicial determination (*United States* v. *Morton Salt Co.*, 338 U. S. 632 at 639).

CONCLUSION

The decision of the court below is clearly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

HARRY N. ROUTZOHN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

WILLIAM A. LOWE,
SYLVIA S. ELLISON,
Attorneys,
United States Department of Labor.

APRIL 1953.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C. 201 et seq.):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

* * * * *

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Depart-

ment of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

Federal Trade Commission Act, c. 311, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

* * * * *

Administrative Procedure Act, c. 324, 60 Stat. 237, (5 U.S.C. 1001 *et seq.*):

SEC. 6 * * *

* * * * *

(c) Subpenas.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

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